

**Remarks of FCC Commissioner Michael O’Rielly
Before the ACA International Washington Insights Conference
May 16, 2019**

Thank you, Mr. Gonsalves, for that very kind introduction. I realize that I am appearing at the tail end of your conference, and following such a prominent and knowledgeable panel, no less. The truth is, I was originally supposed to speak to this distinguished audience yesterday but was summoned to testify before the House of Representatives, where I discussed regulatory issues affecting your industry and the need to protect legitimate business practices, among other topics. Many thanks to ACA International’s staff for working to accommodate the schedule change and to those of you who have stayed to hear me. Hopefully, I won’t disappoint.

Let’s be honest: speaking in defense of credit and collection professionals probably isn’t the politically savviest or safest move. As you’re well-aware, debt collectors, as you’re known more commonly, are not especially popular in today’s society, and likely never have been. Though, to be fair, I can relate; being a federal regulator isn’t the most endearing role either. But being well-liked cannot be the basis for one’s career choice, or otherwise we’d all be candy makers or florists. After all, who doesn’t love their local confectioner?

When I think of the credit collection process, I am reminded of a quote by Earl Wilson, a former major league baseball pitcher from the 1960s, who turned into quite the quotable individual before passing in 2005. Think of Yogi Berra without all the World Series Championships. Mr. Wilson once quipped, “If you think nobody cares if you’re alive, try missing a couple of car payments.” That joke works with mortgages or student loans too, by the way. It also reveals that being “popular” isn’t always a blessing; you rarely become more sought after than when you owe something to others.

What exactly is debt? Some may view it as a societal ill, or as part of the darker side of American capitalism. But, if you really think about it, debt is the result of someone believing in and taking a chance on another person’s dreams—albeit for a profit, which is completely legitimate in our market-based society. Indeed, the extension of credit, and in turn the assumption of debt, is what enables many individuals to realize their vision for a corporation, a small business, a future career, a family farm, a first home, or a better mode of transportation. And, debt collection is simply the process of following through on a promise, so there’s money available to make the next loan for someone else’s dream.

Just think what would happen without the work of ACA International’s members. As you know well, without debt collection, the cost of lending would soar, as any defaults would be absorbed by future borrowers. Your actions keep interest rates lower than they would be otherwise. Consistent with governing statutes, your industry does everything it can to ensure that borrowers meet their obligations. And, you work extra hard to prevent defaults through payment plans and deferments, since those instances are the costliest for lenders, borrowers, and society at-large. If only the world knew how much effort you devote to keeping people in their homes, current on other loan payments, and out of bankruptcy.

So, I am here to join with your organization as your members continue to face untenable legal risk and uncertainty in your efforts to reach out to borrowers. The last time I spoke before ACA, the DC Circuit had not yet ruled on *ACA International v. FCC*, your organization and others’ seminal challenge to the FCC’s 2015 Omnibus TCPA Order. Like many of you, I applauded that court’s role in setting aside the previous FCC’s unreasonably expansive and uncertain definition of what constitutes an “Automatic

Telephone Dialing System,” or ATDS, under the TCPA, and the deeply flawed one-call safe harbor in the reassigned numbers context.

The Landscape Post-ACA International v. FCC

Unfortunately, despite your organization’s substantial and justified win in that case, the “fog of uncertainty,” as the DC Circuit put it, remains thicker than ever. It remains up to this FCC to respond to that court’s set-asides, re-define ATDS in a clear and rational manner, and complete the adoption of a non-arbitrary reassigned numbers database with a sufficiently workable safe harbor. Despite the DC Circuit’s decision to refrain from invalidating the 2015 standards on revocation of consent, I strongly believe that it is incumbent on our agency to adopt clear rules of the road in that area as well. And, as you know from my previous comments and dissent to the 2015 Order, these issues hardly represent an exhaustive list of warranted TCPA regulatory reforms.

The longer we wait to take these necessary actions, the greater the harms that are inflicted on both organizations and consumers. You know better than anyone that the past FCC’s unclear and expansive TCPA rules have created a crippling litigation threat for businesses in virtually all industries; indeed, there was a 46 percent increase in TCPA lawsuits in the period immediately following the 2015 Omnibus Order, as compared with the period immediately preceding it, according to the U.S. Chamber Institute for Legal Reform.¹

Unfortunately, the DC Circuit victory did not stem that tide, as a patchwork of interpretations by both federal circuit and district courts flowed in response, including those that illogically found the FCC’s 2003 and 2008 orders defining an ATDS to be controlling post-ACA. And, that just pales in comparison to the medley of courts that have chosen to ignore the DC Circuit and instead follow the 9th Circuit’s extremely misguided and breathtakingly expansive definition of ATDS as a device that stores numbers to be called, irrespective of whether they have been generated by a random or sequential number generator. (Statutory text? What statutory text?) Now, with the Fourth Circuit’s recent decision to declare the government-backed debt exemption facially unconstitutional and sever it from the statute, practically no calls—not even those to collect debts owed to or guaranteed by taxpayers—are beyond the claws of unscrupulous plaintiffs’ lawyers. What a mess.

Finishing the Pending Rulemaking

Now, more than ever, it’s crucial that we get the rulemaking done, and ensure that honest businesses can call their customers without being threatened by bankruptcy. The cottage industry of TCPA litigants isn’t picky in terms of whom it targets; everyone from mom and pop home security companies, to the Humane Society, has fallen victim. And, it’s not consumers who ultimately reap the proceeds of judgments and settlements, but attorneys; the average recovery for TCPA class members is a few measly dollars, whereas the average recovery for a plaintiff’s lawyer is well over \$2 million.²

The consequences of a failure to act are dire for consumers as well. I’ve had countless businesses come into my office to tell me that it’s now too risky to call their customers and provide them with critical and

¹ *TCPA Litigation Sprawl*, U.S. Chamber Institute for Legal Reform (August 2017), https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

² Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, Wall Street Journal (June 15, 2015), <https://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610>.

time-sensitive information. These are not entities randomly soliciting strangers and creating a nuisance, or even telemarketing—as if that’s a terrible thing—but providing data security breach notifications, prescription refill reminders, bill due date notices, school closure alerts, and notices of flight schedule changes. Others have told me that they are only making landline calls, excluding texts and calls altogether to wireless-only consumers, an increasing segment of the population. That chilling effect causes disparate harm to the latter segment of consumers, who are more likely to be younger and lower-income.

To be clear, the Commission is not sitting on its hands unaware of the TCPA debates brewing in the courts and affected boardrooms. But, we are a busy agency. Under this Chairman, we have been extremely focused on moving an aggressive, deregulatory, pro-consumer agenda that reflects current market realities. Failure to address TCPA is not a failure of leadership, nor can the blame be placed on Chairman Pai. Instead, the onus is on you and others to raise awareness of the need for corrective actions to a much, much greater extent. While I am already convinced of the need to act and can help somewhat, it’s your job to convince my colleagues and agency staff to do so. May I humbly suggest that the advocacy of one lone industry will not be enough to truly move the needle. It will take extensive cooperation and collaboration with everyone else caught in the TCPA spider web, screaming the same message at the same fever pitch.

Terminology and Priorities Matter

Repeat after me: “robocall” is not a bad word. There are good and legal robocalls, and there are scam and illegal robocalls, and it’s the latter that are wreaking havoc on the nation’s communications networks. Let’s face it: information is often better and more accurately conveyed by dialing automatically from a list or through pre-recorded messages rather than through a live operator. Moreover, the use of automated technology generally translates into lower costs, freeing up resources for more efficient uses, including lower prices. Regulators and lawmakers need to stop vilifying automated calls and be clear and precise about the problem and the actors we are addressing: in other words, the scammers, neighborhood spoofers, overseas criminals, and phone number harvesters, some of whom are not even necessarily engaged in robocalling. An overly-expansive definition of ATDS does absolutely nothing to deter or prevent these criminals. If anything, it ignores and distracts from the true menace confronting our nation.

However, for those who profit from predatory lawsuits, there’s an obvious benefit in using the same robocall terminology to describe all automatic dialers and capturing legitimate US businesses in gotcha regulation purportedly targeting scammers. It’s so much easier to sue the good guys than the bad guys. But, by interpreting TCPA language so expansively, we don’t make a dent in the real problem, and may even make it worse. In fact, according to so-called comedian John Oliver’s own statistics, in the aftermath of the 2015 FCC Omnibus Order expanding TCPA liability, illegal robocalls exploded.³ Yet, due to our own policy failure, lawyers and courts were too busy chasing after legitimate companies and driving them out of business.

I would also be remiss if I didn’t address a certain misleading narrative being peddled by certain groups purporting to represent consumer interests: that the vast majority of robocalls in the US are perpetrated

³ Eric Troutman, *Fact Checking John Oliver’s Robocall Bit: It Was Hilarious but Was It Accurate?*, National Law Review (March 13, 2019), <https://www.natlawreview.com/article/fact-checking-john-oliver-s-robocall-bit-it-was-hilarious-was-it-accurate>.

by US corporations, and that 17 of the top 20 robocallers are debt collectors.⁴ That statistic, however, is based on data that does not distinguish legitimate wanted calls from unwanted scam calls, and instead lumps together *all* calls that are automatically dialed. In other words, a legitimate fraud alert is treated the same as an IRS scam call. While I'm not casting aspersions on the veracity of this data point, it does not convey useful information from a regulatory point of view and relying on it to advocate a policy outcome is extremely misleading.

In fact, a deeper dive reveals that debt collection calls, which are already highly regulated outside of the TCPA, actually represent just 2 percent of unwanted calls.⁵ And, it makes a lot of sense that this number would be so low: consumers generally don't want to miss out on debt collection notices. They want to receive information that would help them prevent delinquency and default, having their utilities cut, or their credit scores plummet. But many businesses have stopped making these crucial calls because the risk is too great.

This needs to change. We need to restore reasonableness and certainty, while focusing squarely on the criminals and scam artists plaguing our nation's communications systems. Make no mistake: some of these illegal actors are extremely sophisticated, and prescriptive rules won't suffice on their own. We need to be one step ahead of scammers themselves, and that generally requires very innovative technology. Thanks to market forces, cutting-edge companies have developed their own software-based solutions, involving advanced algorithms, machine learning, artificial intelligence, and consumer feedback. We should applaud these efforts, as well as initiatives by carriers to implement call authentication and verification, along with call blocking and filtering services, usually free of charge, to their customers. Incidentally, Chairman Pai circulated an item yesterday item to give carriers more flexibility and liability protection in blocking unlawful calls. While I have not yet had a chance to read the draft in depth, supporting carriers in their efforts is certainly a good start.

At the same time, we need to be vigilant and realistic, because scammers will continually find ways to circumvent these technology-driven protections. Further, it is crucial that we achieve accuracy and prevent false positives: there must be mechanisms to swiftly correct errors and prevent the mis-labelling and blocking of legitimate, legal robocalls.

Resolving the Many Pending TCPA Petitions

We must focus on real solutions, not maintaining overbroad regulations for political expediency. Moreover, we have an obligation to resolve many of the worthy TCPA petitions that are currently pending, stuck in what seems like perpetual legal limbo. If implementing the DC Circuit's directives in *ACA International* takes much longer, the Commission should at least act swiftly to provide some relief in these discrete instances.

Several of these common-sense requests relate to the issue of prior express consent. For example, one petitioner seeks a declaratory ruling to exempt from TCPA liability purely informational and governance-related calls by credit union co-ops to their own members' wireless phones. Another seeks a declaration that motor vehicle safety-related recall notices fall under the TCPA's emergency exception and are thus

⁴ *Abusive Robocalls and How We Can Stop Them: Hearing before the U.S. Senate Committee on Commerce, Science & Transportation*, 115th Cong. 4 (2018) (written testimony of Margot Saunders, Senior Counsel, National Consumer Law Center).

⁵ *Robocall Radar Spam Trends: 2018 Report*, Hiya, <https://hiya.com/robocall-radar> (last visited May 6, 2019).

exempt from the prior express consent requirement. Given the importance of such notices for health and safety purposes, interpreting the TCPA to deter such calls would seem very foolish indeed.

On the telemarketing front, multiple petitions seek clarification on what constitutes an advertisement under the TCPA. The Commission's vague purpose-based standard has led to certain courts finding that any profit motive whatsoever, no matter how attenuated to the actual content of a communication, constitutes telemarketing, and thus requires a higher threshold of consent. Given the hodgepodge of judicial opinions on this issue, it's obvious that courts need more guidance.

There are also several pending petitions relating to the Commission's junk fax rules. For example, one petitioner seeks a declaratory ruling that faxes sent as email over the Internet do not constitute faxes received on a "telephone facsimile machine," based on the plain meaning of the TCPA's statutory language. Blurring the distinction between fax and email to capture what is effectively the latter within TCPA would seem to have very far-reaching consequences, contrary to the original drafters' intent.

Other petitions deal with the definition of ATDS. For example, one asks for clarification on the status of "peer-to-peer" messaging under the TCPA, even though that platform involves individualized text messages. It's a sad truth that case law has interpreted ATDS so broadly and unpredictably that practically all modern dialing and texting technologies face the threat of legal sanction, even those that take absolutely no part in random or sequential number generation.

It's a similar story with respect to courts' reading of the phrase, "artificial or prerecorded voice to deliver a message." One class action lawsuit currently threatening to drive one home security company out of business involves the question of whether soundboard technology, which involves live operators sending individualized messages on a one-to-one basis, constitutes the use of an artificial or prerecorded voice message. How the district court interprets that statutory phrase, and the pace at which we act on the relevant petition, will literally determine whether that company survives or goes out of business.

That's not to say all the TCPA petitions pending are worthy of our approval. For example, two petitions for reconsideration urge the Commission to reverse its *Broadnet Declaratory Ruling*, which held that federal agencies and contractors acting on their behalf are not persons subject to the TCPA. According to the Commerce Secretary's recent letter to the Commission on this issue, granting a reversal would create massive burdens for federal agencies and taxpayers and would not be justified. I certainly agree, and if it were up to me, I would extend the Broadnet ruling to apply to state and local governments as well.

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You get the point. I won't keep droning on at length, but this is an issue I care deeply about and want to see fixed. While eliminating *illegal* robocalls is a critical priority, we must remain mindful not to catch legitimate organizations, like yours, in the crosshairs. The stakes are too great for businesses, consumers, and the rule of law. I urge you to continue to speak out on this important issue, and I'll continue to do my part in restoring certainty and integrity to our TCPA rules. Thank you for listening and I welcome your questions.